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LETTER DATED 13 FEBRUARY 1996 FROM THE PRESIDENTS OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

The Judges of the International criminal Tribunal for the former Yugoslavia (the "Yugoslavia Tribunal") and the International Tribunal for Rwanda (the "Rwanda Tribunal") jointly present their compliments to the members of the Security Council and have the honour to bring to their attention the following matter.

At the second plenary session of the Rwanda Tribunal, held 8-11 January 1996, proposals for amendments to its Statute (the "Rwanda Statute") were agreed to by consensus. Proposals for similar amendments to the Statute of the Yugoslavia Tribunal (the "Yugoslavia Statute") were agreed to at the ninth plenary session of the Yugoslavia Tribunal, held 17-18 January 1996. Of course, any amendment to either Statute must be made by the Security Council; as such the Judges of both Tribunals, by means of this official note, request that the Security Council consider implementing the proposed amendments to both Statutes. This official note is intended to explain the reasons for the proposals, copies of which are attached.

The problem is essentially one of av ilability of Judges. Although the workload of the Chambers of the two Tribunals is, at this stage, not sufficiently heavy that this problem has interfered with the functioning of either Tribunal, it has become clear that the problem will inevitably arise, particularly in view of the fact that the workload of the Chambers of both Tribunals is expected to increase dramatically in the coming months. The proposals discussed below are intended to address this concern. As the situation now stands, if a Judge falls ill or is disqualified, the resulting shortage of eligible Judges may seriously delay proceedings or leave one of the Tribunals unable to function. To give two examples:

1. Where all six of the Yugoslavia Tribunal's Trial Chamber Judges have been involved in a case (with three Judges having been involved in a review of the indictment under Rule 61 and the other three having heard the trial) which later comes before the Appeals Chamber. If one of the Judges of the

Appeals Chamber were to fall ill or become unavailable for some reason, the Appeals Chamber simply could not function because, under the current system, there would be no other Judge to call upon.

2. Where a Judge on one of the Rwanda Tribunal's Trial Chambers is ill and unable to carry out his or her duties. Although provision is made in the Rules of Procedure and Evidence of that Tribunal (the "Rwanda Rules") for the temporary assignment of a Judge from one Trial Chamber to the other, if the three Judges in the Trial Chamber are unavailable because they are hearing another case or disqualified because they had already performed a Rule 61 review, that Tribunal could not function.

In view of the foregoing, there is no doubt of the need to increase the pool of Judges. This can be accomplished in one of two ways: (a) by the election by the General Assembly of new Judges to act when required; or (b) by expanding the tasks of the Judges who currently sit on the two Tribunals. Mindful of the expense associated with the election of new Judges and in view of the current financial crisis affecting the United Nations, the Judges of both Tribunals hold the view that the latter solution would be preferable.

Two additional advantages would result if the tasks of the Judges were increased. First, the six Judges who were appointed to sit on the Rwanda Tribunal would have a greater role in the administration of justice, thereby leading to greater equality between the two Tribunals. Secondly, there would be a greater interplay between two Tribunals with very similar legal and procedural issues. This interplay would benefit both Tribunals.

The experience of the Yugoslavia Tribunal to date has indicated that the temporary assignment of Judges can be a successful way to address some of the problems of availability of Judges; 1/ however, amendment of the statutes is required in order to address all such problems by the temporary assignment of Judges. Temporary assignment is provided for in Rule 27 (C) of the Yugoslavia Tribunal's Rules of Procedure and Evidence (the "Yugoslavia Rules"), but only for assignment between the Chambers of the Yugoslavia Tribunal. No provision is made in either the Rwanda Statute or the Yugoslavia Statute (nor in the Yugoslavia Rules or the Rwanda Rules) for the participation of Judges from one Tribunal's Trial Chambers in the Trial Chambers of the other; nor is there any provision for participation of Judges from the Rwanda Tribunal Trial Chambers in the determination of appeals from either Tribunal.

It is widely felt by the Judges of both Tribunals that it would be appropriate to allow Judges to be temporarily assigned from one Tribunal to the other and from all Trial Chambers to the joint Appeals Chamber on an ad hoc basis, as required. Thus the system would be flexible enough to permit a Yugoslavia Tribunal Trial Chamber Judge to sit, on a temporary basis on the joint Appeals Chamber (and, thus, hear appeals from the Trial Chambers of either

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1/ When one of the Trial Chamber Judges, Judge Sidhwa, fell ill in 1995, the assistance of an Appeals Chamber Judge, Judge Stephen, was required. Judge Stephen sat on the preliminary motions in the Tadic matter and will continue to sit on the Trial Chamber until the end of the trial.

Tribunal) or on a Trial Chamber of the Rwanda Tribunal. Similarly, a Rwanda Tribunal Trial Chamber Judge could also sit on a temporary basis on the Appeals Chamber (and hear appeals from the Trial Chambers of either Tribunal) or on a Trial Chamber of the Yugoslavia Tribunal. Finally, Appeals Chamber Judges would be in a position to sit temporarily on either Tribunal's Trial Chamber.

Conclusion

In sum, the potential problem of having an insufficient number of Judges has been recognized by both Tribunals as one that could be extremely damaging to the functioning of the Tribunals. Two solutions exist to solve this problem: to increase the number of Judges available or to keep the number constant while expanding their judicial responsibilities by increasing flexibility of assignment. The second option is the most efficient and cost-effective way to proceed, and is one to which all Judges have consented. As well as solving many of the problems that may arise when Judges become unavailable, this solution will result in greater equality between the two Tribunals and encourage valuable interaction between them.

If the Security Council is of the view that the above-described amendments to the two Statutes are not appropriate, the Judges would like to suggest that two additional Judges be appointed to each Tribunal as soon as possible in order to ensure that both Tribunals continue to function in the months ahead - months that are expected to be extremely busy ones. As noted, this is the more costly alternative but, for the reasons given, the Judges are unanimously of the view that it is the only alternative to the proposal for amendment of the Statutes outlined above.

(Signed) Antonio CASSESE
President of the Yugoslavia Tribunal

(Signed) Laity KAMA
President of the Rwanda Tribunal

Annex I

Proposed amendments to the Statute of the International Tribunal for Rwanda

Article 12

2(a) The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda. 2/

(b) The Appeals Chamber may, where appropriate, include judges of the International Tribunal for Rwanda jointly appointed, after consultation with the judges of the International Tribunal for Rwanda and of the International Tribunal for the Former Yugoslavia, by the two Presidents to sit for a specific case. 3/

(c) The Appeals Chamber shall elect a Presiding Judge from among its members. 4/

Article 13

2(a) After consultation with the Judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers

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2/ The principle that members of the Appeals Chamber of the Yugoslavia Tribunal will also serve as members of the Appeals Chamber for the Rwanda Tribunal would remain unchanged.

3/ Although not specified, in practice, the proposed amendment would mean that even if Judges from the Rwanda Tribunal were appointed, there could never be more than two Trial Chamber Judges from the Rwanda Tribunal sitting on the Appeals Chamber if the matter before them was an appeal of a decision of the Rwanda Tribunal. This is because four of the six potential candidates would have dealt with the case already: one Judge would have confirmed the indictment and three other Judges would have delivered the trial decision.

4/ This provision would mean that the President of the Yugoslavia Tribunal would no longer automatically preside over the Appeals Chamber in all instances, as is the case based on the current version of Article 14(2) of the Yugoslavia Statute. This would allow for a Judge from the Rwanda Tribunal's Trial Chambers to act as President - something which may be particularly desirable in an appeal of a decision from the Rwanda Tribunal.

[Delete: A judge shall serve only in the Chamber to which he or she was assigned]. 5/

(b) Where appropriate, and after consultation with the judges of the International Tribunal for the Former Yugoslavia and the judges of the International Tribunal for Rwanda, the Presidents of the two Tribunals may jointly assign one or more judges from the International Tribunal for the Former Yugoslavia to serve in any of the Trial Chambers for a specific case. 6/

5/ In discussing Sub-rule 27(C) of the Yugoslavia Rules and the Rwanda Rules (which, in each case, deals with temporary assignment of Judges) the Judges of the two Tribunals have interpreted this wording as meaning that, while Judges could be temporarily assigned, they remained a member of the Chamber to which they were first assigned. It is felt, however, that as amendments are being proposed for the Statutes in respect of the temporary assignment of Judges, it would be appropriate to clarify matters by deleting the wording.

6/ In addition to solving the availability problems outlined in the official note, it is important to stress that a system which allows a Trial Chamber Judge from the Rwanda Tribunal to sit on the Yugoslavia Tribunal will create an interplay between the two Tribunals which does not otherwise exist at the same level. In view of the fact there are many common issues before the two Tribunals, such as genocide, crimes against humanity and serious violations of international humanitarian law, the resulting osmosis will be advantageous to both Tribunals.

Annex II

Proposed amendments to the Statute of the International Tribunal for the Former Yugoslavia

Article 14

Delete paragraph 2 (which provides: "The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.") 7/ and renumber the paragraphs accordingly.

2(a) After consultation with the Judges of the International Tribunal, the President shall assign the judges to the Appeals Chamber and to the Trial Chamber [Delete: A judge shall serve only in the Chamber to which he or she was assigned]. 8/

(b) Where appropriate, and after consultation with the judges of the International Tribunal and the judges of the International Tribunal for Rwanda, 9/ the Presidents of the two Tribunals may jointly assign one or

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7/ This amendment, when combined with the proposed addition of Article 12(2)(c) of the Rwanda Statute, would allow a Judge of the Rwanda Tribunal's Trial Chamber to act as President of the Appeals Chamber. Although the Judges intend that, in the normal course, the President of the Yugoslavia Tribunal will preside over the Appeals Chamber, this amendment would allow greater flexibility.

8/ In discussing Sub-rule 27(C) of the Yugoslavia Rules and the Rwanda Rules (which, in each case, deals with temporary assignment of Judges) the Judges of the two Tribunals have interpreted this wording as meaning that, while Judges could be temporarily assigned, they remained a member of the Chamber to which they were first assigned. It is felt, however, that as amendments are being proposed for the Statutes in respect of the temporary assignment of Judges, it would be appropriate to clarify matters by deleting the wording.

9/ Since this is the first time the Rwanda Tribunal is referred to in the Yugoslavia Statute, it appears necessary to give its full title, cumbersome though it is, followed by a shortened version. The title, as it appears in the Rwanda Statute (before being shortened) is: "the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as 'the International Tribunal for Rwanda')".

more judges from the International Tribunal for Rwanda to serve in any of the three Chambers for a specific case. 10/

3. The judges of each [delete: Trial] Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of the Chamber as a whole. 11/

10/ In addition to solving the availability problem outlined in the Official Note, it is important to stress that a system which allows a Trial Chamber Judge from the Rwanda Tribunal to sit on the Yugoslavia Tribunal will create an interplay between the two Tribunals which does not otherwise exist at the same level. In view of the fact there are many common issues before the two Tribunals, such as genocide, crimes against humanity and serious violations of international humanitarian law, the resulting osmosis will be advantageous to both Tribunals.

11/ The deletion of the word "Trial" would reflect the fact that the President of the Yugoslavia Tribunal would no longer necessarily preside over the proceedings of the Appeals Chamber; an election of a Presiding Judge will be required in each of the three Chambers, instead of just the two Trial Chambers.